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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1547

JOHN MOHAN, WILLIAM BOYD, WESLEY BRODERSON, GEORGE POPLASKI, EDMUND DOBBS, AND BRUCE THOMPSON, INDIVIDUALLY AND AS POLICE OFFICERS OF THE CITY OF CHICAGO,

Petitioners,

VS.

HARVEY L. KERR,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent prays that the requested writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 26, 1972.

STATEMENT OF THE CASE.

The statement of the case by Petitioners herein does not adequately set forth the issues in this case. Those issues are fully set forth in the two opinions which have been written in this matter by the United States Court of Appeals for the Seventh Circuit. The central issue in this cause is not whether defendants had probable cause to arrest plaintiff. Rather, as alleged in the Complaint, the issue was whether plaintiff's civil rights were violated by the actions of defendants, who, he alleged, severely beat him, detained him in excess of 24 hours without access to an attorney or to his family, without food, water, sleep or access to toilet facilities. Defendants did force a purported confession from plaintiff, and, while he was never convicted of the alleged crimes, he was forced to remain in Cook County jail, because of it, for a period of 18 months while criminal proceedings were pending against him.

Defendants' statements concerning the criminal proceedings are somewhat confusing, and do not set forth the proceedings accurately. When plaintiff was brought before a judge, more than 24 hours after he had been taken into custody "for questioning" by defendants, he immediately entered a plea of not guilty. He was brought to trial in that criminal matter, and the only evidence was the confession which had been extorted from him. Despite the introduction of this confession, the jury would not convict him, having been deadlocked. Subsequently, that confession was suppressed, as having been uncon-

stitutionally obtained. It was at that point that the criminal charges against plaintiff were dismissed by the prosecution. Significantly, the fact of this dismissal was not allowed to be presented to the jury in the trial of this cause.

REASONS FOR REFUSING THE WRIT.

Defendants have failed to present any valid reason why this Court should consider this case and overturn the decision of the Court of Appeals. Defendants' argument that it was necessary to their defense to introduce the entire body of the confession to the jury is spurious. Defendants argue, in effect, that they be allowed to rely on the details of a coerced confession to prove that they should have extorted it in the first place. Such an argument is indeed brazen. Actually, what defendants are asking the Court to do is to allow them to attempt to retry plaintiff's guilt before a jury where the real issue is whether his confession was voluntary or not.

A reading of the transcript of the trial below would lead one to believe that it was plaintiff who was on trial. Defendants, apparently taking to heart the adage that the best defense is a good offense, did their best to prove that plaintiff had in fact committed the crime with which he was charged, and of which he was not found guilty, and various other crimes, with which he was not even charged or tried.

The one and only issue to be determined here was whether plaintiff's civil rights had been violated. In

such a case, it is clear, that plaintiff's guilt or innocence of the crime with which he was charged at the time has absolutely no bearing upon that issue. There is no question that the entire thrust of the defense in this case was directed not toward whether plaintiff's constitutional rights had been violated, but whether plaintiff had been guilty of the crimes with which he was charged. For example, in his closing argument, defense counsel stressed this again and again:

> "Now, did they have reasonable grounds to arrest Harvey Kerr after he was in the station, keeping in mind that he came to the station voluntarily—Harvey Kerr admitted this; there is no dispute as to that. Now, what is the most reasonable ground the policeman could have that somebody committed the crime? A confession. What could be more reasonable than a confession that this person committed the crime?"

Indeed, defense counsel attempted to read the confession to the jury during closing argument.

Yet, no one has ever claimed that the fact that a confession had been given could not be brought home to the jury. And, it is agreed, that defendants are able to introduce to the jury that part of the confession wherein plaintiff allegedly stated that he was making it voluntarily. Yet, defendants wish this Court to take cognizance of this case and rule that they can not only show that plaintiff did in fact confess to a crime (which has never been disputed by plaintiff), but parade all of the gruesome details contained in that confession before the jury in order to make it well nigh impossible for the jury to focus upon the proper issues in this case—whether plaintiff's civil rights had been violated. As has been

emphasized by the Court of Appeals twice in this case, it makes absolutely no difference whether plaintiff was guilty of the crime charged or not. Even if guilty, he still would be able to recover damages for the violation of those rights. Indeed, the best statement of this issue is contained in the opinion of the Court of Appeals:

> "Certainly the nature of the confession reciting, as it did, the details of plaintiff's participation in the planning and execution of a burglary culminating in the violent death of the victim, could prejudice the jury against the merits of the plaintiff's claim in his civil rights case against the police officers. . . . The substance of the confession so irremediably interjected the question of plaintiff's guilt into this case that its prejudicial impact could not be cured by admonition to the jury that plaintiff's guilt was not at issue."

Defendants, in their Petition for Certiorari, have completely ignored this point, and have presented absolutely no reason why this Court should reverse such an obviously correct ruling. Defendants contend that this confession "is the best and most reliable evidence available to petitioners to rebut respondent's allegations." (Petition for Certiorari, p. 7) Such a contention is obviously spurious. How does the contents of this confession rebut any of the following facts, which are central to plaintiff's claim: that plaintiff was beaten and seriously injured; that he was not allowed to consult an attorney; that he was not allowed to see his family; that he was not given any food for 24 hours; that he was not allowed to use the toilet. Obviously, it has absolutely nothing to do with those claims. Even if every word in plaintiff's confession were true, the involuntary extortion of that confes-

sion from him would be a violation of his rights. Reading the contents of that confession must prejudice the jury against plaintiff and divert its attention from the true issue of the cause, particularly, as here, where it is claimed that the statements contained therein are false. The jury cannot help but speculate as to whether that confession is true or false, thus depriving plaintiff of the fair trial to which he is entitled.

The rights sought to be vindicated here are based upon the same reasoning which led to this Court's decision in *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758 (1965), where it was said:

> "We have . . . learned the . . . lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, those rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

It is the vindication of those rights which is at issue here, not whether plaintiff was guilty of a crime.

Finally, the most significant fact of all has been completely ignored by defendants. As noted in the opinion of the Court of Appeals, at the oral argument before that Court "counsel for defendants forthrightly admitted that *those parts of the confession referring to plaintiff's implication in the murder were not relevant to the issues at trial.*" (Petition for Certiorari, A. 3) Having made

that admission before the Court of Appeals, it is indeed surprising that defendants now have the temerity to ask this Court to reverse what they themselves admitted to be true. Such a position is indeed astounding.

Contrary to the argument made by defendants, the confession herein is not an admission by plaintiff against his contentions at this trial, except for that small part wherein he purports to state that it was made voluntarily. The issue is, again, whether the confession was made voluntarily, not whether he was guilty of a crime. This confession cannot be treated as an admission, except to the limited extent permitted by the Court of Appeals, because it has absolutely nothing to do with the central issue of this trial—its voluntariness. As recognized by that Court, the probative value of the details of this confession on this issue is so far outweighed by its obvious prejudicial impact as to make it obviously inadmissible. All of the cases cited by defendants in Section II of their argument are obviously not applicable to a situation such as this, and provide no support for their position.

Finally, the immense prejudice against plaintiff, as recognized by the Court of Appeals, cannot be brushed away with the appellation "harmless error." That argument was not raised by defendants below, and cannot be raised for the first time here. The constant emphasis upon those facts by defense counsel during the trial shows that he felt, contrary to the arguments made by defendants now, that the facts of the alleged crime were extremely important. Having made such great and telling

use of those alleged facts to plaintiff's detriment at the trial, defendants cannot be heard to say at this late juncture that they were unimportant. Their impact was incalculable. Only by allowing plaintiff a retrial, as ordered by the Court of Appeals, may this error be rectified.

Respondent, therefore, respectfully prays that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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